United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1394

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-1394

ROY GIORDANO,

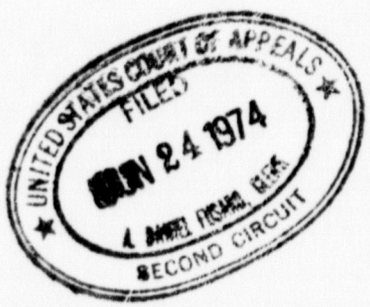
Defendant-Appellee

vs.

JOHN J. NORTON, Warden, FCI, Danbury, Connecticut,

Petitioner-Appellant

BRIEF FOR DEFENDANT-APPELLEE ROY GIORDANO



Dennis E. Curtis
127 Wall Street
New Haven, Connecticut

Counsel for Defendant-Appellee
Roy Giordano

TABLE OF CONTENTS

TABLE OF CASES CITED

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-1394

ROY GIORDANO,

Defendant-Appellee

-vs-

JOHN J. NORTON, Warden, FCI, Danbury, Connecticut,

Petitioner-Appellant

BRIEF FOR DEFENDANT-APPELLEE

ROY GIORDANO

Statement of the Case

On February 7, 1974, the District Court for the District of Connecticut (Newman, J.) granted a writ of habeas corpus and ordered that Petitioner-Appellee be discharged from custody unless the Parole Board holds a hearing within sixty days to determine whether they should be released on parole. By orders dated April 2, 1974, a panel of this Court (Hays, Oakes, Christensen) granted Appellant's motion for a stay pending appeal and denied

without prejudice Appellee's motion for bail pending appeal. On appeal Petitioner-Appellee's case is consolidated with appeals by Appellee James Bivona and Appellee Edgar Acosta.

STATUTES INVOLVED

1 United States Code Section 109

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

18 United States Code Section 4202

A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

Section 1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1294

Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section ... or abated by reason thereof.

26 United States Code Section 7237(d), repealed effective May 1, 1971

(d) No suspension of sentence; no probation; etc. - Upon conviction -

(1) of any offense the penalty for which is provided in subsection (b) of the section, subsection (c), (h), or (i) of section 2 of the Nartocic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended ...

the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code ... as amended, shall not apply.

ISSUE PRESENTED

Does the repeal of 26 U.S.C. 7237(d), effective May 1, 1971, allow incarcerated narcotics offenders who were convicted under the former statute to receive parole consideration under 18 U.S.C. 4202?

STATEMENT OF FACTS

Appellee Giordano was arrested on October 27, 1970, and charged with violation of 21 U.S.C. 173 and 174 by unlawful trafficking in heroin. He pleaded guilty to the indictment and was sentenced on January 17, 1972, to a five-year term of imprisonment. Subsequently, after serving more than one-third of his total sentence, he requested parole hearings pursuant to 18 U.S.C. 4202. The Parole Board denied these requests because it classifies him ineligible for parole under the former restrictive sentencing provisions of 26 U.S.C. 7237(d), rather than consider him eligible for parole under the more lenient sentencing provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. Congress repealed 26 U.S.C. 7237(d), effective May 1, 1971.

ARGUMENT

UPON THE REPEAL OF 26 U.S.C. § 7237(d), PERSONS CONVICTED UNDER THE NON-PAROLE PROVISIONS OF THE FORMER STATUTE ARE NO LONGER SUBJECT TO EXCLUSION FROM PAROLE CONSIDERATION UNDER 18 U.S.C. § 4202.

The congressional repeal of 26 U.S.C. § 7237(d) freed from non-parole provisions those persons convicted under the former statute who would otherwise have been eligible for parole under 18 U.S.C. § 4202. Neither of the two "savings" provisions potentially applicable to 26 U.S.C. § 7237(d) are sufficient to restrict parole eligibility. The first of these, Section 1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1294, preserves those "prosecutions" for violations which have occurred prior to May 1, 1971. The second of the "savings" provisions, 1 U.S.C. § 109, provides for the preservation of any "penalty" incurred under any former statute which has been repealed. The nature of parole is not encompassed by either of the terms "prosecution" or "penalty" and the ineligibility for parole thus is not "saved" by either of these two provisions.

The Supreme Court has not yet determined the effect of § 1103(a), 84 Stat. 1294 on parole eligiblity under 18 U.S.C. § 4202. The question is directly presented in United States ex rel. Marrero v. Warden, Lewisburg Penitentiary, 483 F.2d 656 (3d. Cir. 1973), cert. granted 94 S.Ct. 865 (1974). However, in Bradley v. United States, 410 U.S. 605, the Court addressed the related issue of parole eligibility under 18 U.S.C. § 4208(a) which allows

the sentencing court to provide for early parole consideration directly within the sentence. Although the Court in Bradley reserved consideration of parole under 18 U.S.C. § 4202, Id. at 612, its treatment of the "prosecution" test has clear implications for the question here. Bradley committed his crime before the repeal date of 26 U.S.C. § 7237(d) but was sentenced after that date under 18 U.S.C. § 4208(a). The Court reasoned that "prosecution" in the legal sense terminates when final sentence is imposed. Any decision on early parole explicitly made within the imposition of sentence, as in 18 U.S.C. § 4208(a), is part of the judgment of the case and is "saved" under the "prosecution" test:

> Section 1103(a) thus means merely that the District Judge cannot specify at the time of sentencing that the offender may be eligible for early parole. Bradley, at 611.

Under 18 U.S.C. § 4202 parole is not explicitly considered during sentencing by the District Judge. Instead, "parole arrises after the end of the criminal prosecution, including imposition of sentence." Morrissey v. Brewer, 408 U.S. 471, 480 (1971). Under sentences imposed pursuant to 18 U.S.C. § 4202, parole is not within the domain of the Court's powers of prosecution but by law comes under the supervision of an administrative agency, the Parole Board. This reasoning leads to the conclusion that parole eligibility under 18 U.S.C. § 4202 is not encompased by a "prosecution" test under § 1103(a), 84 Stat. 1294. Hence non-parole provisions of the former statute 26 U.S.C. § 7237(d) were not "saved" after the effective repeal date May 1, 1971, by the "prosecution" test.

Under the second of the "savings" statutes, 1 U.S.C. §109, the question is whether the non-parole provision of 26 U.S.C. § 7237(d) is a "penalty." In Morrissey, the Supreme Court viewed the function of parole as an integral and constructive phase of the correctional process. Morrissey, supra, at 477. In sentences imposed under 18 U.S.C. § 4202, the granting of parole is a discretionary action of the Parole Board made upon evaluation of the applicant's rehabilitation. Parole is not an automatic right acquired by the inmate upon serving one-third of the sentence imposed. It is a resource of the correctional process "[t]o help individuals reintegrate into society as constructive individuals as soon as they are able, ..." Id., at 477. Since the granting of parole is not a right but is a part of correctional confinement, the withholding of parole is neither a deprivation of rights nor a penalty. As interpreted by the Third Circuit, parole is part of the rehabilitative process available to a convicted person:

> We ... hold that permanent parole ineligibility is not a 'penalty' incurred under § 7237(d). We read § 7237(d)'s preclusion of parole as a dated legislative judgment as to the manner by which the actual penalty, i.e., the prison sentence, should be effectuated. To read it otherwise would preclude carrying out the apparent congressional judgment, in repealing the parole ban, that the rehabilitative goals of the criminal justice system will be furthered by parole. Marrero, supra, at 663.

The Court in Marrero thus interprets the congressional intent of the non-parole provisions in the former statute not as the deprivation of a right - and hence a "penalty" - but as an out dated concept of how a sentence

should be carried out. Thus under neither the former statute 26 U.S.C. § 7237(d) nor under the "savings" clause, § 1103(a), of the replacement legislation, the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1294, is the withholding of parole a deprivation of an inmate's right which serves as a "penalty". Hence non-parole provisions of 26 U.S.C. § 7237(d) were not "saved" by any "penalty" test of 1 U.S.C. § 109.

CONCLUSION

Parole non-eligibility is neither a part of the "prosecution" of nor a "penalty" imposed upon persons convicted as narcotics offenders under the former 26 U.S.C. § 7237(d). Since the effective repeal date, May 1, 1971, parole non-eligibility is not preserved by the "savings" provisions of either § 1103(a) of the 1956 Act or of 1 U.S.C. § 109. The judgment of the District Court should therefore be upheld.

Respectfully submitted,

Dennis E. Curtis
Stephen Wizner
Michael J. Churgin
Attorneys for Petitioner-Appellee
127 Wall Street
New Haven, Connecticut 06520
(203) 436-2210

On the Brief:

Paul Sieving
Yale Law School
Class of 1976

I certify that I have this 19th day of June, 1974 served the foregoing document upon Barry Cutler, Esq., Assistant U.S. Attorney, by United States mail, properly addressed and with postage prepaid.